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CRANE PORT SYSTEMS SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, KUALA LUMPUR
ASMABI MOHAMAD JCA
[ORIGINATING MOTION NO: 25-199-10-2014]
B 5 OCTOBER 2015

REVENUE LAW: *Income tax – Assessment – Appeal against – Non-attendance on date fixed for mention of case – Dismissal of appeal on grounds of non-attendance by Special Commissioners of Income Tax (SCIT) – Application to High Court for* C *permission to appeal against deciding order of Special Commissioners of Income Tax – High Court's jurisdiction in income tax cases – Whether limited to questions of law – Whether application an abuse of court process – Income Tax Act 1967, Sch 5 para 39*

D ***CIVIL PROCEDURE:*** *Jurisdiction – High Court – Application to High Court for permission to appeal against deciding order of Special Commissioners of Income Tax – Whether jurisdiction limited to questions of law – Whether application an abuse of court process*

The respondent had raised and served notices of additional assessment to the E applicant. The applicant filed an appeal against the additional assessment and the applicant's case was registered at the Special Commissioners of Income Tax ('the SCIT'). However, the applicant failed to attend three mention dates before the SCIT. The SCIT finally dismissed the applicant's appeal on the ground of non-attendance, pursuant to para. 17(1)(b) of Sch. 5 of the Income Tax Act 1967 ('the ITA'). Hence, in the present application, the applicant F sought to be granted permission to appeal against the deciding order of the SCIT under para. 36 of Sch. 5 of the ITA.

Held (dismissing application with costs):

G **(1)** There was no merit in the applicant's application. The application by the respondent was misconceived and an abuse of the process of the court. The applicant ought not to have approached this court for the deciding order to be set aside and for the appeal to be reinstated. (paras 23, 24 & 36)

H **(2)** The applicant had circumvented the provisions of para. 18 of Sch. 5 of the ITA. What the applicant ought to have done was to seek for extension of time before the SCIT for the application to set aside the deciding order made in its absence by justifying its failure to turn up before the SCIT on the date the case was fixed for mention. It was up to the SCIT whether to reinstate the case or otherwise. The jurisdiction I was therefore vested on the SCIT to entertain any application by the appellant and/or any taxpayer. (paras 14 & 15)

(3) The applicant had totally ignored the provisions of para. 39 of Sch. 5 of the ITA which provides that the High Court's jurisdiction over income tax cases under the ITA is only limited to questions of law arising from the cases stated. Therefore, the applicant was bound by para. 39 of Sch. 5 of the ITA. The ITA does not envisage a situation that this court must undertake an evaluation of the facts which are entrusted on the SCIT to do. (paras 16 & 22)

Case(s) referred to:
Government of Malaysia v. KPM Modal Sdn Bhd [2002] 6 CLJ 221 HC ***(refd)***
Kenny Heights Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2015] 5 CLJ 923 CA ***(refd)***
Mui Bank Bhd v. Golden Hornbill Hotel Sdn Bhd [1993] 1 CLJ 204 HC ***(refd)***

Legislation referred to:
Income Tax Act 1967, s. 89, Sch. 5 paras. 17(1)(b), 18, 34, 35, 36, 39

For the applicant - Saravana Kumar & Jason Tan; M/s Lee Hishammuddin Allen & Gledhill
For the respondent - Abdul Aziz Harun, Mohammad Fazli Lutffi & Hartini Hawarip; FCs, Inland Revenue Department

Reported by Najib Tamby

JUDGMENT

Asmabi Mohamad JCA:

Introduction

[1] By this originating motion dated 24 October 2014 made pursuant to para. 36 of Sch. 5 of the Income Tax Act 1967 ('ITA'), the applicant sought that it be granted permission to appeal against the deciding order issued by the Special Commissioners of Income Tax ('SCIT') dated 8 July 2013 ('exh. TSW-1' of encl. 2) and subsequently the applicant be allowed to require the SCIT to state a case for the opinion of the court pursuant to para. 34 of Sch. 5 of the ITA.

The Cause Papers

[2] For the purpose of this case the following cause papers had been filed and referred to by the court:

(i) the application for the applicant's to be granted permission to appeal against the deciding order under para. 36 of Sch. 5 of the ITA dated 24 October 2014 (encl. 1);

(ii) the applicant's affidavit in support of encl. 1 affirmed by Tang Sze Wei on 3 October 2014 (encl. 2);

(iii) the respondent's affidavit in reply affirmed by Abdul Aziz bin Harun on 30 January 2015 (encl. 4);

(iv) applicant's affidavit in reply affirmed by Tang Sze Wei on 17 February 2015 (encl. 5); and

(v) the respondent's second affidavit in reply by Abdul Aziz bin Harun on 5 March 2015 (encl. 6).

The Brief Facts

[3] The brief facts are as follows:

(i) on 5 July 2010 the respondent raised notices of additional assessment dated 26 July 2010 for year of assessment ('YA') 2007 and YA 2008. These notices were served on the applicant on 26 July 2010;

(ii) on 25 May 2012 the applicant filed notices of appeal ie, Forms Q for both YA 2007 and YA 2008 ('exh. TSW-4' of encl. 2) to appeal against the notices of additional assessment issued by the respondent;

(iii) the applicant's case was registered at the SCIT on 19 April 2013 ('exh. AAH-2' of encl. 4);

(iv) on 23 April 2013 the SCIT sent a letter to the applicant and respondent;

(v) on 9 May 2013 the applicant failed to attend on the first mention date before the SCIT;

(vi) on 7 June 2013 the applicant failed to attend on the second mention date before the SCIT;

(vii) on 12 June 2013 the respondent sent a letter informing the applicant of the next date ('exh. AAH-3' of encl. 4);

(viii) on 8 July 2013 the applicant's appeal was dismissed under para. 17(1)(b) of Sch. 5 of the ITA as the applicant was not present before the SCIT.

The Issue

[4] The only issue framed by the applicant for this court's determination is:

> Whether the Applicant should be granted permission for an extension of time to appeal against the Deciding Order issued by the learned Special Commissioners of Income Tax dated 12th July 2013 and consequent thereto, the Applicant be allowed to require the Special Commissioners of Income Tax to state a case for the opinion of this Honourable Court pursuant to paragraph 34 of Schedule 5 of the Income Tax Act 1967.

Discussion Of The Issue And The Court's Decision

[5] The applicant's application stemmed from the deciding order of the SCIT which dismissed the applicant's appeal on 8 July 2013 on the ground that the applicant was not present before the SCIT on the date the case was fixed for mention. The deciding order was made pursuant to para. 17(1)(b) of Sch. 5 which provides as follows:

> Where a party to an appeal fails to attend, either personally or by representative of the kind referred to in paragraph 14, at the time and place fixed for hearing of the appeal, the special commissioners:
>
> (a) if they are then and there satisfied that the defaulting party is prevented from attending by sickness or other reasonable cause, shall postpone the hearing for what appears to them to be an appropriate time, or they may hear and decide the appeal in the absence of the defaulting party if he requires them to do so;
>
> (b) if they are not satisfied, may hear and decide the appeal in absence of the defaulting party, or may dismiss the appeal if the defaulting party is the appellant, or may postpone the hearing for what appears to them to be an appropriate time.

[6] Paragraph 17(b) gives the discretion to the SCIT to hear and decide the appeal in the absence of defaulting party, and if the defaulting party is the appellant the SCIT may dismiss the appeal or may postpone the hearing of the appeal to an appropriate time suitable to all parties.

[7] Paragraph 18 of Sch. 5 of the ITA states as follows:

> Where, after a deciding order had been made under paragraph 17 as a result of a party's failure to attend at the time and place fixed for the hearing of an appeal, the Special Commissioners are satisfied on an application made within 30 days after the making of the order that the defaulting party was prevented from attending by sickness or other reasonable cause, they may set aside the order and fix a time and place for a fresh hearing of the appeal.

[8] Paragraph 18 of Sch. 5 of the ITA provides an avenue for any taxpayer, against whom a deciding order had been made due to his absence from court at the time and place fixed for hearing of an appeal for reason of sickness or other reasonable cause, to set aside the deciding order made against him within thirty (30) days after the date of the order.

[9] From the above it would appear that the SCIT is vested with the jurisdiction to entertain any application to set aside the deciding order obtained due to the taxpayer's absence on the date of proceedings and/or to reinstate the same. The deciding order was made on 8 July 2013. The applicant had until 7 August 2013 to apply to the SCIT for the deciding order to be set aside and for the appeal to be reinstated. The applicant had failed to exercise his right under para. 18 of Sch. 5 of the ITA but had proceeded to this court instead for it to be given permission to appeal against the said deciding order and consequently for it to be allowed to require the SCIT to state a case for the opinion of this court under para. 34 of Schedule 5 of the ITA.

[10] Learned counsel for the applicant had submitted that this court is vested with the jurisdiction to entertain the applicant's application under para. 36 of Sch. 5 of the ITA. Paragraph 36 of Sch. 5 provides as follows:

A The High Court on application of an intending appellant made by summons in chambers may extend the period of twenty-one days mentioned in paragraph 35.

[11] Paragraph 36 must be read with paras. 34 and 35 of Sch. 5 of the ITA which provide as follows:

B 34. Either party to proceedings before the Special Commissioners may appeal on a question of law against a deciding order made pursuant to subparagraph 26 (b) or (c) by requiring the Special Commissioners to state a case for the opinion of the High Court and by paying to the Clerk at the time of making the requisition such fee as may be prescribed from time
C to time by the Minister in respect of each deciding order against which he seeks to appeal.

35. A requisition under paragraph 34 shall be in writing and shall be sent or delivered to the Clerk within twenty-one days after service on the intending appellant of the order against which he seeks to appeal.

D **[12]** The applicant had sought for it to be given permission to appeal against the deciding order issued by the SCIT dated 8 July 2013 and further for the court to make an order that the applicant to be allowed to require the SCIT to state a case for the opinion of this court. In gist what the applicant attempted to do was for this court to grant it an extension of time to enable
E the applicant to appeal against the deciding order dated 8 July 2013, which dismissed its appeal due to the applicant's non-attendance in court. Given the factual matrix as illustrated above, would the SCIT be able to prepare the case stated with regard to the appeal made by the applicant pursuant to Forms Q especially if there is no fact finding before the SCIT.

F **[13]** In the event this court grants the extension of time and the appeal is allowed to be filed, this would only relate to the issue surrounding the deciding order dated 8 July 2013 ie, the dismissal of the applicant's appeal for failure to attend court on the hearing date and not the substantive appeal under Forms Q as the same had not been heard and a deciding order had not
G been made yet.

[14] This would certainly offend para. 18 of Sch. 5 of the ITA as the applicant had not resorted to the mechanism provided by the said paragraph because it was out of time to do so before the SCIT. By moving this court by way of encl. 1, the applicant had in fact circumvented the provisions of
H para. 18 of Sch. 5. What the applicant ought to have done was to seek for an extension of time before the SCIT for the application to set aside the deciding order made in its absence by justifying its failure to turn up before the SCIT on the date the case was fixed for mention and it is then left to the SCIT whether to reinstate the case or otherwise.

I **[15]** The jurisdiction is therefore vested on the SCIT to entertain any application by the appellant and/or any taxpayer to set aside the order and/or to reinstate the appeal, provided the applicant is able to satisfy the SCIT

the grounds for its failure to attend before the SCIT on 8 July 2013 and thereby had caused the appeal to be dismissed. There must be cogent grounds provided to the SCIT to justify the setting aside and subsequently the reinstatement of the appeal.

[16] Following from what I have stated above and based on the applicant's application to this court *vide* encl. 1 for the applicant to be granted permission to appeal against the deciding order dated 8 July 2013, it would appear the applicant had totally ignored the provisions of para. 39 of Sch. 5 of the ITA. Under para. 39 of Sch. 5 the High Court's jurisdiction over income tax cases under the ITA is only limited to questions of law arising from a case stated. Therefore the applicant is bound by the provision of para. 39 of Sch. 5.

[17] The provisions of para. 39 of Sch. 5 are as follows:

> The High Court shall hear and determine **any question of law arising on a case stated under paragraph 34** and may in accordance with its determination thereof:
>
> (a) Order the assessment to which the case relates to be confirmed, discharged or amended;
>
> (b) Remit the case to the Special Commissioners with the opinion of the court thereon; or
>
> (c) Make such other order as it thinks just and appropriate.
>
> (emphasis added)

[18] The provisions of para. 39 of Sch. 5 had been explained by the Court of Appeal in the case of *Kenny Heights Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2015] 5 CLJ 923 where the Court of Appeal *vide* the judgment of His Lordship Abdul Wahab Patail JCA (as His Lordship then was) had stated as follows:

> [22] The appeal to the High Court is upon a case stated by SCIT. Paragraph 39 of Schedule 5 is specific that the appeal to the High Court is limited to questions of law arising from the case stated. The KPHDN is, as other parties are, bound by para. 39. Examination of the case stated by the SCIT shows meticulous presentation of the facts, the evidence, the submission, the relevant law and reasoning of the SCIT. It demonstrated a thorough consideration of facts. It does not betray *ex facie* any error on any question of law as to warrant appellate intervention.
>
> [23] Re-examining the grounds of judgment of the High Court, we cannot but observe the High Court only had different view of para. 16. We have dealt with that view and how it was arrived at earlier above. But apart from the different view which the High Court held and sought to explain in its grounds of judgment, the grounds of judgment clearly did not demonstrate with reasoning any error on the part of the SCIT in the case stated.

A [24] We make the general observation that courts, acting in accordance with the law, are at all times bound by the legislation placing jurisdiction and authority in specialised bodies such as SCIT. The legislation specified that the deciding order of the SCIT is final and allowed appeals to the court on question of law and not on any grievance. It underlines, within the SCIT's jurisdiction, its authority and prevents the courts being buried
B under avalanche of tax appeals by parties unhappy with the determination of the KPHDN and the SCIT.

[25] Courts must also bear in mind the SCIT's specialisation. Dealing with terms and practices of the business and the business community enable them to have special insight, understanding and appreciation of the
C evidence and facts, to make the findings drawn from those evidence and facts. While a finding of fact often touches upon the law, the determining factor in the finding is their special insight and appreciation of the facts. Hence, unless it is demonstrated that SCIT had erred on a question of law, resulting in a manifest error in the deciding order, the court cannot intervene, as it would amount to interference contrary to the intent of
D legislation setting up and empowering the SCIT. (see *Lower Perak Co-operative Housing Siciety Berhad v. Ketua Pengarah Hasil Dalam Negeri*, [1994] 3 CLJ 541; [1994] 2 MLJ 713 SC).

[19] From the above it is clear that the deciding order of the SCIT is final and the appeal to the High Court by way of case stated is only limited to
E questions of law arising from the case stated, and not just any grievance. According to the Court of Appeal "It underlines, within the SCIT's jurisdiction, its authority, and prevents the courts being buried under an avalanche of tax appeals with the determination of the KPHDN or the SCIT".

F **[20]** As resolved by the Court of Appeal in the above case, the appeals from the SCIT's deciding order are based only on questions of law and it is not the duty of the court hearing the appeals to make findings of facts and/or decide on the issues of facts.

G **[21]** As could be seen in exh. TSW-1 of encl. 2 it is clearly stated that the applicant's appeal had been 'DIBATALKAN' by the SCIT pursuant to para. 17(1)(b) due to the applicant's failure to be present before SCIT. This showed that the applicant's appeal had not been heard on merits yet.

[22] In the event this court grants the applicant's prayers as stated in
H encl. 1 herein and if the applicant is granted leave to appeal against the SCIT's deciding order, the SCIT would not be able to prepare a case stated which contains the findings of facts as found by the SCIT after a full blown trial before them as the appeal had not proceeded for hearing. The ITA did not envisage a situation that this court must undertake an evaluation of the
I facts which is entrusted on the SCIT to do.

[23] In view of the above I could not but agree with the respondent that the attempt by the applicant is clearly an abuse of the process of court. The applicant ought to have filed its application for the deciding order to be set aside and the appeal be reinstated before the SCIT for the SCIT's decision. Any explanation as to the delay in filing the application to set aside and reinstatement ought to be addressed to the SCIT for their consideration. The applicant ought not to have approached this court for the deciding order to be set aside and for the appeal to be reinstated in the manner it was done herein.

[24] Based on the aforesaid grounds, there is no merit in this application and on this ground alone encl. 1 ought to be dismissed with costs.

[25] In the event I am wrong in my appreciation of the law as adumbrated above and/or for the sake of completeness, I will also delve on the issue of whether the applicant had satisfied the court that its absence before SCIT on 8 July 2013 was justifiable and with cogent grounds and/or that the applicant had satisfactorily explained to the court the reason for its failure to be present before the SCIT.

[26] Learned counsel for the applicant had submitted at length on the principles this court should adopt in exercising its powers to extend time to the applicant to appeal against the deciding order dated 8 July 2013. I have perused all the authorities cited by both parties and noted the principles which were highlighted to me. I have no issue with the applicable law with respect to the granting of extension of time. However in exercising the power to grant the extension of time, I still have to examine these general principles against the backdrop of the case at hand.

[27] Section 89 of the ITA makes it mandatory for every person chargeable to tax to notify the respondent within three months of the change of address by notice in writing. By virtue of this provision the applicant is duty bound to inform the respondent of the change of its registered address by way of a written notice. For purposes of the ITA "Any person" mentioned in s. 89, would include the taxpayer's company. Like any other taxpayers, the applicant has a duty to notify the respondent its latest address and/or any change of its address.

[28] It was the contention of the applicant that the ITA does not prescribe the form of the notice under s. 89 of the ITA. Therefore the letters sent by the tax agent dated 14 December 2012 and 9 October 2013 ('exh. TSW-7 & exh. TSW-8 of encl. 1) sufficed and constituted notices of change of address as envisaged by s. 89 of the ITA.

[29] A perusal of exh. TSW-7 to encl. 2 would show that the contents of the letter dated 14 December 2012 was only confined to enclose supporting documents to Inland Revenue Board and nothing in the said letter specifically notified the respondent of the change of address of the applicant. In fact, the

applicant itself acknowledged the purpose of the letter dated 14 December 2012, being sent to Inland Revenue Board in exh. TSW-8 where it was stated:

> (e) Our letter dated 14 December 2012 submitting the documents as requested by the IRB in their letter dated 12 December 2012; and…

[30] Exhibit TSW-8 to encl. 2 showed that the purpose of the letter was to enquire the status of the appeal from Inland Revenue Board and there was nothing in that letter which suggested that the applicant was notifying the respondent of the change of its address.

[31] Although the ITA does not provide a particular form for the notification of the change of address, s. 89 mandated the applicant to "inform the Director-General of the change by notice in writing". Upon perusal of these letters I am of the view that these letters could not in any way be stretched and or classified as notices for change of address as envisaged by s. 89 of the ITA. (see *Government of Malaysia v. KPM Modal Sdn Bhd* [2002] 6 CLJ 221).

[32] The applicant had failed to demonstrate that it had complied with the provision of s. 89 of the ITA. Therefore it cannot blame anybody but itself if the letters sent by the respondent and/or the SCIT were not brought to its attention. It is the court's view that the principles stated in the case of *Mui Bank Bhd v. Golden Hornbill Hotel Sdn Bhd* [1993] 1 CLJ 204 equally applies to this case in which the court held that:

> The respondent who changed its registered office without notifying the Registrar of Companies as required by s. 120(1) Companies Act 1965 could not rely upon the cancellation or change to defeat a service that was properly effected at its former registered office especially when the fact of the cancellation or change was not known to the petitioner at the time of the service.

In view of the above there is no cogent reason for this court to grant the extension of time prayed by the applicant.

[33] It is observed that the SCIT did not dismiss the appeal at the first instant but had in fact given the three (3) opportunities to the applicant to be present before the SCIT. Notwithstanding these reminders, the applicant chose not to be present before the SCIT.

[34] Further it is observed that the applicant had also failed to make a formal application for extension of time to file the application to set aside the deciding order of the SCIT and for the same to be reinstated under the provision of the Rules of Court 2012. It had opted to bypass the law to seek for extension of time. The law as regard to extension of time is so settled and I will not attempt to delve with the issue at this stage. I had perused the written submissions of both learned counsel relating to when and how this

court should exercise its power to allow for abridgement of time and I agree with the respondent that there is no justifiable reason for this court to grant the prayers sought *vide* encl. 1 more so when the prayers had not been sought for by the applicant in its encl. 1.

[35] Based on the aforesaid, I am of view that the SCIT had carefully made the deciding order to dismiss the applicant's appeal due to the applicant's failure to be present before the SCIT on the specified dates. As a taxpayer, the applicant should be more interested in its own appeal and be more vigilant of its responsibilities. It ought to notify all interested parties its new address so that it could be reachable.

Conclusion

[36] Upon perusal of the cause papers, the written submissions filed by both the applicant and the respondent and upon hearing learned counsel for the applicant and the respondent, it is my humble view that the applicant's application is misconceived and an abuse of the process of court. In view of the aforesaid, encl. 1 is dismissed with costs of RM2,000 for the respondent.